



**Question**

Whether the installation of marker posts in relation to the east-west interconnector route is or is not development or is or is not exempted development.

**Location**

East-west interconnector route from Portan (Meath) to Baleally Lane, Rogerstown Fingal.

**Declaration**

Planning Authority

Fingal County Council

Planning Authority Reg. Ref.

FS5/014/22

Applicant for Declaration

Eirgrid PLC.

Planning Authority Decision

Is not exempted development.

**Referral**

Referred by

Eirgrid PLC.

Owner/ Occupier

Eirgrid PLC

Notice Party

Meath County Council

**Inspector**

Lucy Roche.

## 1.0 Site Location and Description

- 1.1. This referral relates to the route of the East-West Interconnector between the townland of Portan in County Meath and Baleally Lane, Rogerstown in Fingal. Specifically, a c20km span of the local and regional road network between Rogerstown Estuary (c1.5km south of Lusk) and Ashbourne Business Park.
- 1.2. This general area is largely rural and characterised by one-off dwellings, clusters of dwellings, farmsteads, and open fields.

## 2.0 Background

- 2.1. The East- West Interconnector (EWIC) is a high – voltage direct current submarine and underground power cable which links the electricity transmission grids of Ireland and Great Britain. The EWIC has been in commercial operation since December 2012 and allows the trading of electricity between the island of Ireland and British wholesale electricity markets.
- 2.2. The cables measure 262km in length, 186km of which is located beneath the Irish Sea, requiring only minimal maintenance. Eirgrid is proposing to install 80no. safety marker posts in total to alert members of the public to the location of the underground cables between Baleally Lane, Rogerstown in Fingal to the townland of Portan in County Meath.
- 2.3. An application for Declaration of Exempted development was lodged to Fingal County Council in respect of 51No. Marker posts that are located along the existing underground East West Interconnector route. A concurrent Section 5 Declaration was lodged to Meath County Council in respect of the other 29 no. marker posts that are located within their jurisdiction.
- 2.4. Meath County Council (Reg. Ref. S52216) decided their application on 22<sup>nd</sup> April 2022 and declared the proposed development to be exempted development.
- 2.5. It is the 51no. marker posts included in the application for declaration of exempted development lodged with Fingal County Council that form the basis of this Section 5 Declaration.

### 3.0 The Question

3.1. The application to Fingal County Council was lodged on the 29<sup>th</sup> of March 2022. The question put before the Council was as follows:

*'Whether the installation of approximately 80 (29 in Co. Meath) concrete marker posts in relation to the east-west interconnector route is or is not development or is or is not exempted development'.*

3.2. The applicants, Eirgrid, are proposing to install 80no. safety marker posts in total along the route of the EWIC between Baleally Lane, Rogerstown in Fingal and the townland of Portan in County Meath.

3.3. In accordance with the details submitted with the referral, it is the 51 No. marker posts included in the application to Fingal County Council that form the subject of this section 5 Declaration.

3.4. Following a review of the location maps etc submitted in support of the application and appeal, it would appear that 1 of the 51no marker posts, Marker Post 30 (MP30), is located within the boundary of County Meath, I refer the board to the Rural Place Map, Drawing Number APS-GIS-MP-023-000 for details.

3.5. Therefore, in the interests of clarity, it is considered appropriate that the question referred to the Board be reworded as follows:

*'Whether the installation of 51no. concrete marker posts in relation to the east-west interconnector route is or is not development or is or is not exempted development'.*

### 4.0 Supporting Documentation

4.1. The referrer has provided site location maps, rural place maps and google earth / aerial images, identifying the exact location of 30 of the 80 marker points proposed along the route of the East-West Interconnector. However, the exact location of the remaining 50no marker posts, all of which are located within the Fingal area and relevant to this referral, has not been provided.

4.2. The location of each of the 51no marker posts (the subject of this Section 5 referral) has been plotted on a Google aerial map and is characterised in Table 1.0 of the

Screening Report for Appropriate Assessment. The locations identified appear to be indicative only.

## 5.0 Planning Authority Declaration

### 5.1. Declaration

5.2. On the 26<sup>th</sup> of April 2022, Fingal County Council issued a Notification of Declaration under Section 5 of the Planning and Development Act 2000 (as amended) that the installation of approximately 80 (29 in Co. Meath) concrete marker posts in relation to the east-west interconnector route is not exempted development for the following reason:

*Having examined the proposed development it is considered that the installation of concrete marker posts along the East-West Interconnector cable route is development, and it is not exempted development having regard to the absence of a specific class of development within the Planning and Development Act 2000 as amended or the Planning and Development Regulations 2001 as amended which is considered to provide an exemption to the development proposed.*

### 5.3. Planning Authority Reports

#### 5.3.1. Planning Reports

Basis for the Planning Authority's decision. Includes:

Re. Development:

- The installation of concrete marker posts along the East-West Interconnector cable route is considered to comprise development

Re: Exempted Development

- The subject of the referral refers to the provision of above ground structures (marker posts) and as such the provisions of Class 26, is not applicable
- Section 4(1)(g) of the 2000 Act is not applicable in this instance as the proposal does not entail the carrying out of works for the purposes of

‘inspecting, repairing, renewing, altering ore removing pipes, cable or other apparatus

- As the proposal relates to the provision of marker posts for underground cables and not an underground gas pipeline, the exemption set out under Class 25(c) does not apply
- There is no specific class of development within the Planning and Development Act or Regulations which is considered to provide an exemption for the proposal. Article 9 is not applicable in this case.

Re: AA Screening

- Given the non-definitive nature of the exact location of each marker post proposed in Fingal, the planning authority was not in a position to determine whether the proposal would have a significant effect on any European site. Furthermore, it is unclear whether the measures referred to in the AA screening contained in the method statement referred to in that document (which was not included in the application documentation) would constitute mitigation measures.

Re: EIA

- No EIA required

### 5.3.2. **Other Technical Reports**

None

## 6.0 **Planning History**

### 6.1. **Planning History**

ABP Ref: SID/03/08:           Permission granted (2009) for High Voltage Direct Current (HVDC) East West Interconnector between Ireland and Great Britain.

## 6.2. Referral History

### 6.2.1. Meath County Council Section 5 Ref: RA S52216 (March 2022)

Regarding the question '*whether the installation of approximately 80 (29 in Co. Meath) concrete marker posts in relation to the east-west interconnector route is or is not development or is or is not exempted development*'. Meath county Council concluded that the development is exempted development.

### 6.2.2. Fingal County Council Section 5 Ref: FS5/013/19 (May 2019).

Regarding the question '*whether the installation of approximately 80 additional concrete marker posts (approximately 51 of which are located in Fingal) along the east-west interconnector route is or is not development or is or is not exempted development*' Fingal County Council concluded that the proposal was not exempted development for the following reasons: (1) the absence of a specific class of development within the Planning and Development Act 2000, as amended or the Planning and Development Regulations 2001 (as amended) which is considered to provide an exemption to the development proposed. (2) the lack of clarity regarding the need for appropriate assessment

## 6.3. Other Relevant Referral Cases

RL3811 - Question as to whether the construction of a pillar structure to house an electricity meter on the edge of a laneway, at Drumquill, Castleblaney, County Monaghan is or is not development or is or is not exempted development, The Board decided that the proposal was development and was not exempted development, based on the following conclusions:

(a) The construction of a pillar structure to house an electricity meter on the edge of a laneway constitutes works, which in turn constitutes development within the meaning of the Planning and Development Act 2000, as amended.

(b) The development of the structure that has taken place does not come within the scope of any provisions afforded exempted development status under Section 4(1)(g) of the Planning and Development Act 2000, as amended, and

(c) The development of the structure does not come within the scope of any class afforded exempted development status for the purposes of the Planning and Development Act 2000, as amended.

## **7.0 Policy Context**

### **7.1. Natural Heritage Designations**

The proposed development relates to a c20km span of the local and regional road network between Rogerstown Estuary (c1.5km south of Lusk) and Ashbourne Business Park. This route does not pass through any designated Natura Sites however it does run adjacent to a c20m section of the Rogerstown Estuary SAC (site code 0208) in the Townland of Newhaggard, c2.3km south of Lusk. It also crosses the north-western tip of the Rogerstown Estuary pNHA at roughly the same location.

## **8.0 The Referral**

### **8.1. Referrer's Case**

The submission on behalf of Eirgrid Plc can be summarised as follows:

- An application for Declaration of Exempted Development was lodged to Fingal County Council in respect of 51No. Marker posts that are located along the existing underground East West Interconnector route. A concurrent application was lodged to Meath County Council in respect of the other 29 no. marker posts located within their jurisdiction.
- Meath County Council (Reg. Ref. S52216) decided their application on 22<sup>nd</sup> April 2022 and declared the proposed development to be exempted development.
- The exact location of the Marker Post is not relevant to the declaration
- It is submitted that the installation of 51 no. marker posts along the existing Interconnector cable route, constitutes exempted development pursuant to Class 26, Part 1, Schedule 2 of the Planning and Development Regulations,

2001 (as amended) and under Section 4(1)(g) of the Planning and Development Act 2000 (as amended)

- Re. Class 26: It is contended that the marker posts are required in order to alert the general public to the location of the of the cables. This is considered an ancillary use to the existing underground cables and fall within the category of 'other apparatus' therefore constituting exempted development.
- Re: Section 4(1)(g): The marker posts are for the statutory undertaker (Eirgrid/EWIC) to have ready identification of the cable for the purposes of repair, maintenance and inspection works.
- Re. Article 9:
  - (i) The proposed development does not contravene a condition attached to a permission
  - (ii) No amendments of this nature are proposed
  - (iii) The proposed development will not endanger public safety by reason of traffic hazard or obstruction
  - (iv) The proposal does not include the alteration of any building
  - (v) It is not considered that the proposed works will have any impact upon the character of a landscape, view or prospect of special amenity value or special interest
  - (vi) The proposed does not consist of the excavation, alteration or demolition of places, caves, sites features or other objects of interest
  - (vii) The proposed development will not comprise the excavation, alteration or demolition of any archaeological monument included in the record of Monuments and Places
  - (viiA) The proposed use of the proposed works will not have an effect on the integrity of a European Site. the submission is accompanied by an Appropriate Assessment Screening report which has determined that no likely effects will occur to any European Site
  - (viiB) The proposal will not have an adverse impact on an area designated as a natural heritage area



- (viii) The proposed development will not comprise the extension, alteration, repair or renewal of an authorised structure the use of which is an unauthorised use.
- (ix) The proposed development will not consist of the demolition of a building or structure etc
- (x) There is no fencing or enclosure included in this proposal
- (xi) The proposal will not obstruct any public right of way
- (xii) The proposal does not constitute works to a structure located within an ACA

## 8.2. Planning Authority Response

Having examined the applicant's referral, the planning authority has no further comments to make in relation to the proposal. They request that the Board uphold its decision.

## 8.3. Notice Parties:

Meath County Council: The planning authority has no observation / comment to make.

## 9.0 Statutory Provisions

### 9.1. Planning and Development Act, 2000 (as amended)

#### 9.1.1. Section 2(1) Interpretation – defines the terms used within the Act including:

“statutory undertaker” means a person, for the time being, authorised by or under any enactment or instrument under an enactment to— (a) construct or operate a railway, canal, inland navigation, dock, harbour or airport, (b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or (c)

provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking;

“use”, in relation to land, does not include the use of the land by the carrying out of any works thereon

‘structure’ means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined....

“Works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

9.1.2. **Section 3(1)** defines development as follows:

“development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

9.1.3. **Section 4(1) (a) – (l)** sets out what is exempted development for the purposes of this Act and includes.

(g) development consisting of the carrying out by any local authority or statutory undertaker of any works for the purpose of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus, including the excavation of any street or other land for that purpose.

9.1.4. **Section 4(2)** of the Act provides that the Minister may, by regulations, provide for any class of development to be exempted development. The principal regulations made under this provision are the Planning and Development Regulations 2001 (as amended).

9.1.5. **Section 4 (4)** states that

Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required.

9.1.6. **Section 177U(9)** refers to screening for appropriate assessment and states that

In deciding upon a declaration or a referral under section 5 of this Act a planning authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.

9.2. **Planning and Development Regulations, 2001**

9.2.1. **Article 3** defines “electricity undertaking” as follows:

“electricity undertaking” means an undertaker authorised to provide an electricity service

9.2.2. **Article 6** refers to Exempted Development Article 6(1) states; Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

9.2.3. **Article 9** of the Regulations provides that exempted development under article 6 of Regulations shall not be exempted development in certain specified circumstances.

9.2.4. **Part 1 of Schedule 2** sets out Exempted Development.

Development by statutory undertakers.

CLASS 25 The carrying out— (c) pursuant to and in accordance with a consent given by the Minister for Public Enterprise under section 8 of the Gas Act, 1976 (No. 30 of 1976), by the Irish Gas Board of development consisting of the construction of underground pipelines for the transmission of gas (but not the construction or erection of any apparatus, equipment or other thing ancillary to such a pipeline save cathodic protection equipment and marker posts),

Class 26, 27, 28, 29 and 29A refer to electricity service and electricity undertaking

CLASS 26: The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables, or other apparatus for the purposes of the undertaking.

## 10.0 **Assessment:**

10.1. At the outset I note that the purpose of this referral is not to determine the acceptability or otherwise of the installation of concrete marker posts along the route of the east-west interconnector in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.

### 10.2. **Is or is not development**

10.2.1. Section 3 of the Planning and Development Act, 2000, as amended, defines 'development' as the *'carrying out of any works on, in, over or under land, or the making of any material change in the use of any structures or other land'*. Having regard to Section 2 of the Act wherein 'works' are defined as including *'any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.'*

10.2.2. The installation of concrete marker posts as proposed would I consider involve the carrying out of 'works' through an act of 'construction' and associated 'excavation', and therefore, constitutes development.

10.2.3. Accordingly, having established that the subject works constitute development within the meaning of the Act, it is necessary to ascertain whether or not they can be considered to be exempted development.

### 10.3. **Is or is not exempted development**

10.3.1. Development can be exempted from the requirement for planning permission by virtue of either (a) Section 4 of the Planning and Development Act 2000 (as amended) or (b) Article 6 of the Planning and Development Regulations 2001 (as amended).

#### Section 4 of the Planning and Development Act 2000 (as amended).

10.3.2. In accordance with the details submitted with this referral, the marker posts are for the statutory undertaker (Eirgrid/EWIC) to have ready identification of the EWIC Cable for the purpose of repair, maintenance, and inspection. Section 4(1)(g) of the Act is therefore considered relevant.

10.3.3. Section 4(1)(g) allows for certain development to be exempted development when carried out by a local authority or statutory undertaker. The definition of 'Statutory Undertaker', as provided in Section 2(1) of the Act, encompasses a range of persons / bodies, including '*...a person, for the time being, authorised by or under any enactment or instrument under an enactment to ...provide, or carry out works for the provision of ...electricity*'. I am satisfied that, Eirgrid PLC, as owners / operators of the EWIC, fall within this category.

10.3.4. The development exempted under Section 4(1)(g) comprises *works for the purpose of inspecting, repairing, renewing, altering, or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus, including the excavation of any street or other land for that purpose.*

10.3.5. While the marker posts once installed will help to identify the location of the EWIC and in turn, facilitate the inspection, repair, and maintenance of the cables, the development, that is the subject of this referral, comprises the installation of marker posts which involves works of 'construction' and associated 'excavation'. Section

4(1)(g) does not include an exemption for the installation / construction of marker posts and therefore the development proposed cannot benefit from the exemption under Section 4(1)(g) of the Act.

Article 6 of the Planning and Development Regulations 2001 (as amended).

10.3.6. Article 6(1) of the Planning and Development Regulations, 2001, as amended, states that subject to Article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in Column 2 of the said Part 1.

10.3.7. Class 26 of Part 1 of the Second Schedule (General) of the Regulations also allows for certain works, undertaken by a statutory undertaker (authorised to provide an electricity service) to be exempted development. An exemption afforded under Class 26 relates to development consisting of the **laying underground** of mains, pipes, cables, or other **apparatus** for the purposes of the undertaking.

10.3.8. In the first instance, I am not satisfied that 'marker posts' can be considered 'apparatus' in this context. Apparatus is defined in the Oxford Dictionary as *'the technical equipment or machinery needed for a particular activity or purpose'*. The particular purpose or activity in this case being the transport of electricity.

In my opinion a 'marker post' is not part of the technical equipment or machinery that is needed for the transport of electricity but an object that is ancillary to the provision of that activity. Notwithstanding, as the marker posts are not to be laid underground, they cannot benefit from exempted development status under Class 26 of Part 1 of the Second Schedule.

10.3.9. Having reviewed Section 4 of the Act and Article 6 and associated schedules of the Regulations, I do not consider there is any other provision which allows for the construction of a pillar structure to house an electricity meter to constitute exempted development.

#### 10.4. **Conclusion on Exempted Development**

10.4.1. Having regard to the foregoing, I conclude that the *installation of 51no. concrete marker posts along the existing underground east-west interconnector route (EWIC)*, is development and is not exempted development.

#### 10.5. **Restrictions on exempted development**

10.5.1. I have concluded that the development cannot benefit from the exempted development provisions under Article 4 of the Act or Article 6 and related schedules of the Regulations. Accordingly, consideration of restrictions on exemptions under Article 9 of the Regulations is not relevant.

#### 11.0 **Appropriate Assessment**

11.1. Notwithstanding the conclusion arrived at that the development in question is not exempted development and as such the restriction in respect of Appropriate Assessment is not relevant, I have considered the potential for significant effects on European sites in the interests of completeness.

11.2. An Appropriate Assessment Screening Report in respect of the 51no marker posts, the subject of this referral, was included in the documentation submitted to the planning authority. The Appropriate Assessment Screening report states that the application site is not located within the boundaries of any SAC or SPA. The report identifies 16 Natura 2000 sites located within 15km of the marker posts and states that the Rogerstown Estuary SPA and SAC are located within 500m of 7 of the marker posts.

11.3. The screening report concludes that the appeal site does not have any direct source-path-receptor link to water courses and that given the nature of the works involving excavation to a depth of only 530mm above existing cabling, it is unlikely that any underground watercourses will be located directly below the posts. The report also states that the installation phase of the proposed development constitutes a secondary risk, but that through the implementation of the specific measures outlined in the method statement, no negative impacts on the SAC or SPA sites will occur. The screening report concludes that the proposed development, individually or in

combined with other developments, is not likely to have a significant effect on any European Site.

- 11.4. The planning authority in their assessment, noted the non-definitive nature of the exact location of each marker post proposed in Fingal and on this basis concluded that they were not in a position to determine whether the proposal would have a significant effect on a European Site. Furthermore, they considered that it was unclear whether the 'specific measures' referred to in the AA screening report and contained in the method statement, would constitute mitigation measures.
- 11.5. Having regard to the nature of the proposed development which comprises the installation of 51no concrete marker posts along the route of the existing underground east-west interconnector (EWIC), the location of the marker posts outside the boundary of any designated site and along the local and regional road network (within grass verges and footpaths), and the minimal works involved in the installation of the marker posts, I am satisfied, on the basis of the information available, notwithstanding the fact that the exact location of the marker posts has not been provided, that the installation of marker posts as proposed is unlikely to have a significant effect individually or in combination with other plans or projects on a European site. I am also satisfied that the measures outlined in the method statement, set out in Section 3.2 of the AA Screening Document, comprise only standard / best practice construction methods that have not been included specifically to avoid significant effects on a European Site.
- 11.6. I therefore conclude that a Stage 2 appropriate assessment (and submission of an NIS) is not required.

## 12.0 Recommendation

- 12.1. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** a question has arisen as to whether the installation of *51no. concrete marker posts in relation to the east-west interconnector route (EWIC)*, is or is not development or is or is not exempted development'.



**AND WHEREAS** Eirgrid PLC requested a declaration on this question from Fingal County Council and the Council issued a declaration on the day of 26<sup>th</sup> April 2022 stating that the matter was development and was not exempted development:

**AND WHEREAS** Eirgrid PLC referred this declaration for review to An Bord Pleanála on the 23<sup>rd</sup> day of May 2022:

**AND WHEREAS** An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,
- (b) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Class 26 of Part 1 of Schedule 2 to the Planning and Development Regulations 2001-2018,
- (d) The submissions on file and the report of the Inspector.

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) The installation of 51no concrete marker posts in relation to the east-west interconnector route constitutes works, which in turn constitutes development within the meaning of the Planning and Development Act 2000, as amended.
- (b) The proposed development does not come within the scope of any provisions afforded exempted development status under Section 4(1)(g) of the Planning and Development Act 2000, as amended, as the provisions afforded exempted development status do not include the construction of marker posts or similar-type structure

(c) The proposed development does not come within the scope of any class afforded exempted development status for the purposes of the Planning and Development Act 2000, as amended.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the installation of 51 concrete marker posts in relation to the east-west interconnector route is development and is not exempted development.

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Lucy Roche  
Planning Inspector

6<sup>th</sup> March 2023